IN THE INCOME TAX APPELLATE TRIBUNAL
"H" Bench, New Delhi

Before Shri I.C.Sudhir, Judicial Member and
Shri J.Sudhakar Reddy, Accountant Member

ITA nos. 5460, 5461, 5462, 5463, 5464 and 5465/Del/2012
(Assessment Years : 2004-05 to 2009-10)

V.K.Fiscal Services P.Ltd. 12, Ring road, Lajpat Nagar IV New Delhi 110 024	vs.	DCIT, CC 12 Jhandewalan, New Delhi
PAN: AAACV 8561 C **(Appellant)**		**(Respondent)**

Appellant by:- Shri P.C.Yadav, Adv.
Respondent by:- Sh. R.S.Meena, CIT, DR

O R D E R

PER J.SUDHAKAR REDDY, AM

All these appeals are filed by the assessee. As the issues arising out of all these appeals are common, for the sake of convenience, they are heard together and are disposed of by way of this common order.

2. Facts in brief:- The assessee is a Non-banking financial company. It is in the business of finance, investments as well as in trading of cloth and garments. It regularly files its returns of income.

2.1. A search and seizure action was taken in the case of "Rajdarbar group" on 31.7.2008. The A.O. records in the assessment order that during the course of that search operations, certain documents, belonging to the assessee company were found and seized. Thereafter, the case of the assessee company was transferred from Central Circle – V, New Delhi, to the present

Assessing Officer, who is Dy.Commissioner of Income Tax, Central Circle-12, New Delhi vide order dt. 25.3.2010.

2.2. The Assessing Officer issued a notice u/s 153C of the Act dt. 23.7.2010. The same was returned unserved. Thereafter a fresh notice u/s 153C of the Act dt. 2.8.2010 was issued to the assessee company, at the new address furnished to the department by the A.R. of the assessee. In reply to the notice, the assessee filed a return of income for A.Y. 2004-05 on 13.8.2010 declaring loss of Rs.1,28,670/-. The return filed by the assessee company was the same as that was filed originally u/s 139 of the Act on 31.10.2004. Thereafter, the Assessing Officer, after considering the detailed replies filed by the assessee disallowed Rs.1,68,225/-, being a claim made u/s 35D of the Act and completed the assessment computing total income at Rs.39,555/- for the Assessment Year 2004-05.

2.3. Similarly for the Assessment Year 2005-06 the only disallowance made by the A.O. was the claim of deduction u/s 35'D' of the Act, made by the assessee.

2.4. For the A.Y. 2006-07 the only disallowance that was made by the A.O., was by applying Rule 8'D'.

2.5. In the A.Y. 2007-08 the disallowance was made by the A.O. from out of preliminary expenses claimed u/s 35'D' and a further disallowance was made u/s 14'A' of the Act.

2.6. For the A.Y. 2008-09 similar disallowances were made by the A.O. which pertained to (a) S.14'A', (b) preliminary expenses, and (c) disallowance of set off of loss claimed.

2.7. For the A.Y. 2009-10 the disallowance was made by the A.O. u/s 14A and further an adhoc disallowance of Rs.15 lakhs was made out of expenditure claimed by the assessee u/s 37 of the Act.

2.8. Thus, the disallowances/additions as can be seen in all these years, were not made or based on any material much less incriminating material found during the course of search. Disallowances were made based on interpretation of various Sections in the Act with reference to the regular return of income, as well as the books of accounts of the assessee. In other words, it is clear from the assessment orders that no incriminating material whatsoever relating to the assessee was found during the course of search operation in the Rajdarbar Group of Companies and that the additions made or disallowances made were on a difference of opinion or on technical grounds.

3. Aggrieved with these assessments, the assessee filed an appeal before the First Appellate Authority. In the grounds before the First Appellate Authority the assessee challenged the Jurisdiction as well as the assessments on the ground that they are illegal as these assessments were not based on any material found or seized during the course of search in the case of Rajdarbar group of companies. The Ld.Commissioner of Income Tax (Appeals) in his order dt. 24.8.2012 held that the Assessing Officer rightly assumed jurisdiction u/s 153A (sic 153'C' of the Act). He held that assessments u/s 153'A' are

mandatory even when no incriminating material is found in the course of search. Primarily he relied upon the decision of the Hon'ble A.P.High Court in the case of Mr.Gopal Lal Bhadruka vs. DCIT (2012)-TIOL-357-HC-AP-IT. On the ground that the assessee has not discharged the onus that lay on it, he confirmed the disallowances/additions.

4. Aggrieved the assessee is before us on the following grounds for A.Y. 2004-05.

1. That the learned Commissioner of Income Tax (Appeals) has grossly erred both in law and on facts in upholding the order of assessment framed u/s 153C/143(3) of the Act without granting any fair, meaningful and, proper opportunity to the appellant company.

1.1 That the learned Commissioner of Income Tax (Appeals) while disposing of appeal expartee has failed to appreciate that appeal filed by the appellant company was part of a batch of appeals in the case of Rajdarbar group of cases and since counsel for the appellant had duly been appearing in other matters of Rajdarbar group of cases, there remained no occasion to hold that none appeared on behalf of the appellant company in response to notice u/s 250 of the Act and hence, disposal of appeal on expartee basis without granting opportunity to the appellant is unjustified and not valid in law.

2. That even otherwise the learned Commissioner of Income Tax (Appeals) has erred both in law and on facts in failing to appreciate that both the notice issued u/s 153C of the Act and, assessment framed u/s 153A/143(3) of the Act were without satisfying the statutory preconditions in the Act and as such, were without jurisdiction and therefore, deserve to be quashed as such.

2.1. That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that since no money or bullion or jewellery or other valuable article or thing or books of accounts or documents belonging to the appellant were seized as a result of search notice issued u/s 153C of the Act was illegal, invalid and unsustainable.

3. That further more learned Commissioner of Income Tax (Appeals) has erred both in law and on facts in upholding the disallowance of Rs. 1,68,225/- representing preliminary expenses written off and, claimed as deduction by the appellant company.

3.1 That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that the addition made was not supported by any material found as a result of search and as such disallowance made and sustained is perse without jurisdiction and hence unsustainable.

4. That the learned Commissioner of Income Tax (Appeals) has erred both in law and on facts in upholding the levy of interest under section 234 B of the Act which is not leviable on the facts and circumstances of the case of the appellant company.

It is therefore prayed that, that the order made by the learned Commissioner of Income Tax (Appeals) may kindly be set-aside and the assessment framed be held to be without jurisdiction and in any case disallowance made and sustained along-with interest levied may kindly be deleted and appeal of the appellant company be allowed.

4.1. Similar grounds of appeal were raised for the other Assessment Years.

5. Mr.P.C.Yadav, Ld.Advocate represented the assessee and Mr.R.S.Meena, Ld.CIT,D.R. represented the Revenue.

6. Mr.P.C. Yadav did not press ground nos. 1 and 1.1. On ground no.2 he submitted that the very issue of notice u/s 153"C" was bad in law as:

(a) There is no document that belongs to the assessee, which is found during the course of search in the premises of Rajdarbar Group of cases as nothing is mentioned in the assessment order as to what is the document or documents that are belonging to the asseessee, which were found in the premises of the person searched, which triggered the issual of notice u/s 153 C of the Act. It is not mentioned as to which is the particular premises where the said documents if any were found.

(b) No proper satisfaction is recorded by the Assessing Officer of the entity which was searched, where the alleged documents of the assessee are found. He argued that prima facie the material found should be incriminating and only in such situation a satisfaction note can be recorded by the Assessing Officer who has jurisdiction over the person

searched and in whose premises the said documents belonging to the assessee are found and then the material found along with the satisfaction note has to be sent to the officer having jurisdiction over the assessee, who in turn would issue a notice u/s 153 C of the Act.

(c) He submitted that once there are no incriminating material found no proceedings u/s 153'C' can be initiated and hence the notice is bad in law.

(d) He further submitted that even in a case where notice has been issued u/s 153'C', if the Assessing Officer finds that there is no incriminating material, and no assessment or reassessment proceedings are pending as on the date of conducting the search, the proceedings should be dropped. He submits that in the assessee's case no assessment or reassessment is pending as on the date of search or on the date of issue of notice u/s 153'C', and that under those circumstances there is no abatement. In such situation he submitted that unless there is incriminating material, the Assessing Officer should drop the proceedings u/s 153'C' of the Act.

6.1. He further submitted that by virtue of First Proviso to S.153'C' of the Act, the date of handing over the documents, would become the date of search in the case of the other person. That in the case of the assessee, the date of initiation of search will be 25.3.2010 as this is the probable date of handing over documents, as this was the date on which the order u/s 127, transferring the case of the assessee to the present Assessing Officer was made. He submitted that on that date, no assessment or reassessment was pending and hence there was no abatement of assessments. He relied on a number of case laws in support of his contentions that in such a situation, no notice can be given u/s 153'C' unless incriminating material was found in the premises of the searched party. The sum and substance of his arguments are

that the very issual of notice u/s 153'C' was bad in law and that as the additions are not based on any seized material, the assessments are bad in law. He distinguished the judgement of Hon'ble A.P. High Court in the case of Gopal Lal Bhadruka vs. DCIT (supra) by pointing out that the Special Bench of the Tribunal in the case of All Cargo reported in 137 ITD 387 (Mum) had considered the issue and pointed out the distinguishing features. On ad-hoc addition and on merits he disputed the action of the A.O. as confirmed by the Ld.Commissioner of Income Tax (Appeals).

7. The Ld.D.R. on the other hand relied on the order of the First Appellate Authority and submitted that, if the interpretations are to be placed on the sections as sought by the Ld.Counsel for the assessee, then the very object of bringing in S.153'A'/153'C' to the statute would be defeated. He relied on the decision of the Hon'ble A.P.High Court in the case of Gopal Lal Bhadruka (supra) and submitted that the interpretation to defeat the provisions in the Act cannot be resorted to. He argued that the language of S.153'A" is simple, clear and unambiguous and it empowers the Assessing Officer to make the assessments and reassessments, irrespective of the fact whether any incriminating material is found during the course of search or not. He submitted that on merits the additions are perfectly justified and the assessee has not disputed the same. He did not dispute the contentions of the assessee that no incriminating material was found during the course of search in the case of Rajdarbar group of companies as is evident from the assessment orders.

8. In reply the Ld.Counsel for the assessee pointed out that for the A.Y. 2006-07 as well as Assessment Year 2007-08/2008-09 the additions made in a regular assessment order passed u/s 143(3) were repeated in the order passed u/s 153'C' r.w.s. 143(3) of the Act. For the A.Y. 2009-10 he submitted that the issue may be set aside to the file of Assessing Officer for fresh adjudication. He prayed that the ad-hoc disallowance be deleted.

9. Rival contentions heard. On a careful consideration of the facts and circumstances of the case and a perusal of the papers on record and the orders of the authorities below, we hold as follows.

10. The undisputed fact in this case is that there is no incriminating material belonging to the assessee which was found during the course of search in the premises of Rajdarbar group of companies. This fact is evident from the impugned assessment order itself. There is no indication of any material having been found in the course of search and there is no income which was sought to be added based on the search material.

11. On perusal of the assessment record, we find that the Satisfaction Note recorded by the A.O. is as follows.

"23.07.2010

M/s V.K.Fiscal Services P.Ltd. (A.Y. 2008-09)
Satisfaction note for proceedings u/s 153C of the Income Tax Act, 1961

A search operation was conducted on Raj Darbar Group of cases on 31.7.2008. During the course of search operations at the premises of:

(i) Party A-7, Global Reality Ventures P.Ltd. : various papers were found and seized belonging to M/s VK Fiscal Services P.Ltd. The annexure are marked as under:

Party A-7: Annexure A-45 : Hard disc containing books of accounts of M/s VK Fiscal Services P.Ltd.

Thus the proceedings u/s 153 C read with section 153A of the Income Tax Act, 1961 are being initiated in the above case.

Sd/-
Deputy Commissioner of Income Tax
Central Circle 12, New Delhi."

11.1. A perusal of the Satisfaction Note demonstrates that in the hard disk of one of the computers some accounts of the assessee company were found. A print out of these books have been furnished to us by the Ld.CIT,D.R. A perusal of the print out show that page 1 is a "confirmation of accounts" given by the assessee company M/s V.K.Fiscal Services P.Ltd. to Global Reality Ventures Ltd., for the period is 1st April,2008 to 31st March, 2009. As an attachment to this "confirmation of account", V.K.Fiscal Services P.Ltd. has given a copy of ABN Amro Bank (626643) books, copy of trial balance, copy of profit and loss a/c, copy of balance sheet, copy of a part of the cash book, for the period of six months i.e. the period for which it had transactions with Global Reality Ventures, copy of ledger account of Global Reality Ventures and copy of Indian Overseas Bank (7556) ledger account. These in our view are not books of account belonging to the assessee, as sought to have been made out in the Satisfaction Note. This demonstrates that, the Satisfaction Note which says that books of accounts are contained in the hard disk, is a wrong recording of facts. The entire cash book or the bank book is not available in the hard disk. What was available in the hard disk was confirmation of accounts given by the assessee to Global Reality Ventures and statement of

accounts, ledger etc. in support of the same. The relevant portion of the cash book, where the entries of Global Reality Ventures Ltd. are recorded was also there in the hard disk. Thus to hold that the hard disk contains books of accounts of M/s V.K.Fiscal Services P.Ltd. is prima facie wrong. Thus, in our view no money, bullion, jewellery or other valuable articles or books of accounts or documents seized belong to the assessee, warranting issual of notice u/s 153'C',

11.2. Hence we uphold the contention of the assessee that the issual of notice u/s 153'C', under the facts and circumstances, is bad in law.

11.3. We also notice that the A.O. of the assessee is the same as the A.O. of the searched party. We do not know in whose assessment proceedings this satisfaction note was considered.

12. The law on the issue has developed. We refer to some case laws in this regard. The ;procedure to be followed by the Assessing Officer is given in these case laws. We extract the same for ready reference.

12.1. In the case of M/s DSL Properties (P) Ltd. in ITA no.11349/Del/2012 for the A.Y. 2004-05, order dt. 22.3.2013 the ITAT Delhi 'B' Bench held as follows.

"15. From a perusal of the said satisfaction note, it is evident that this paper does not indicate in whose case this satisfaction was recorded and who is the officer recording the satisfaction. There is no mention of name of the assessee. There is no mention of the name of the Assessing Officer and no seal of the Assessing Officer. In the satisfaction note, the Assessing Officer has mentioned the name of various assessees who have been covered for search and seizure action under Section 132(1). The number of such assessees are eight. Now,

during the search of whose premises it was found, is not mentioned. The last line of the satisfaction note reads "I am satisfied that the above documents belong to M/s DSL Properties Pvt. Ltd. and thus its case is being taken up for assessment under section 153C of the Income Tax Act 1961. " A plain reading of the above sentence indicates that it is recorded by the Assessing Officer who is taking action under Section 153C. Thus, it seems that the satisfaction note is recorded by the Assessing Officer of the assessee. This inference is fortified from the fact that on the very same date, i.e., 21st June, 2010, the notice under Section 153C is issued by the same person. The learned CIT-DR also stated that the satisfaction note was recorded by Shri Jeetendra Kumar, ACIT, Circle-8 who issued notice u/s 153C read with Section 153A. However, he tried to justify the action of the Revenue on the ground that after the order under Section 127 of the Income-tax Act by the CIT, Delhi-IV, the jurisdiction of the person searched as well as the assessee both were centralized with the ACIT, Central Circle-8. He also stated that since the Assessing Officer of both the persons was the same, there was no question of handing over and taking over of the documents. We are unable to agree with this view of the learned DR. If the Assessing Officer is assessing the person searched as well as other person whose assets, books of account or documents were found at the time of search, then also, first while making the assessment in the case of the person searched, he has to record the satisfaction that the money, bullion, jewellery or other valuable article or thing or books of account or documents belong to the person other than the person searched. Then, the copy of this satisfaction note is to be placed in the file of such other person and the relevant document should also be transferred from the file of person searched to the file of such other person. Thereafter, in the capacity of the Assessing Officer of such other person, he has to issue the notice under Section 153A read with Section 153C The Assessing Officer of the person searched and such other person may be the same but these are two different assessees and, therefore, the Assessing Officer has to carry out the dual exercise, first as the Assessing Officer of the person searched in which he has to record the satisfaction, during the course of assessment proceedings of the

person searched. After recording such satisfaction note in the file of the person searched, the same is to be placed in the file of such other person. Then, in his capacity as the Assessing Officer of such other person, he should take cognizance of such satisfaction note and thereafter issue notice under Section 158C. In this case, this exercise of recording the satisfaction during the assessment proceedings of the person searched has not been carried out. On the other hand, the Assessing Officer recorded the satisfaction in the case of such other person which does not satisfy the condition of assuming jurisdiction under Section 153C Moreover, no original satisfaction note is available on record. The photocopy of the satisfaction note produced before us does not bear name of any assessee, name of the Assessing Officer or any seal of the Assessing Officer. Therefore, the above satisfaction note cannot be said to be a valid satisfaction note within the meaning of Section 153C.

17. At the time of hearing before us, the learned counsel for the assessee has vehemently contended that the photocopy of the audited profit & loss account and balance sheet was belonging to the shareholder/director from whom the same was found and not to the assessee. We agree with this contention of the learned counsel. When a company supplies photocopy of its profit & loss account and balance sheet to its shareholders/directors, such photocopy of the profit & loss account and balance sheet belong to such shareholder/director and not to the assessee company. If the argument of the Revenue is accepted, then, if, during the course of search of any person the photocopy of the profit & loss account/balance sheet of any listed company, say, Reliance Industries, Tata Motors or Bajaj Auto is found, then, as per the interpretation of Section 153C by the Department, the Assessing Officer would be entitled to take action under Section 153C in the case of such listed company. That interpretation would lead to absurd results. Therefore, we hold that the underlying condition for invoking the jurisdiction u/s 153Cis not satisfied in the case of the assessee.

18. The learned counsel for the assessee has also argued that the Issue of

notice under Section 153C is barred by limitation as per proviso to Section 153C. He stated that as per the Revenue, the satisfaction for initiating proceedings under Section 153C was recorded on 21st June, 2010 and notice under Section 153C was also issued on 21st June, 2010. Thus, obviously, the seized paper was handed over to the Assessing Officer of such other person on 21st June, 2010. Now, as per proviso to Section 153C, the date of search is to be substituted by the date of receiving the books of account or documents or assets seized.

Accordingly, the assessment can be reopened of the preceding six years than 21st June, 2010. They would be AY 2005-06 to 2010-11. The Revenue has reopened assessment for AY 2004-05 which is clearly barred by limitation. The learned OR has contended that since in this case the Assessing Officer of the person searched and the Assessing Officer of such other person was the same, there is no question of handing over and taking over of the document, therefore, for the purpose of limitation, the date of search would be relevant and not the date of initiation of proceedings under Section 153C. Since in this case satisfaction is recorded on 21st June, 2010 and notice under Section 153C is also issued on the same date, then only conclusion that can be drawn is that the Assessing Officer of such other person has taken over the possession of seized document on 21st June, 2010. Accordingly, as per Section 153(1), the Assessing Officer can issue the notice for the previous year in which search is conducted (for the purpose of Section 153C the document is handed over) and six AYs preceding such Assessment Year. Now, in this case, the previous year in which the document is handed over is 1st April, 2010 to 31st March 2011.

The assessment year would be AY 2011-12. Six preceding previous years and relevant assessment year would be as under:-

Previous Year	Assessment Year
1.4.2009 to 31.3.2010	2010-11
1A.2008 to 31.3.2009	2009-10
1.4.2007 to 31.3.2008	2008-09
1.4.2006 to 31.3.2007	2007-08

1.4.2005 to 31.3.2006	2006-07
1.4.2004 to 31.3.2005	2005-06

22. The Assessing Officer has issued notice under Section 153C for A Y 2004-05 which is clearly barred by limitation. Therefore, issue of notice under Section 153C issued by the Revenue cannot be sustained on both the above counts, i. e., it is legally not valid as conditions laid down under Section 153C has not been fulfilled and it is barred by limitation." (Emphasis ours).

12.2. In the case of M/s Therapeutic India (P) Ltd. in ITA nos. 4515 & 4516/Del/2012 for the A.Y. 2006-07 & 2007-08 order dt. 31st May,2013 22.3.2003 the ITAT Delhi 'H' Bench held as follows.

"8. We have heard the rival submissions of both the parties and have gone through the material available on record.
We find that Ld CIT(A) after going through the submissions of assessee has held that the documents seized from the premises of another person were copies of acknowledgement of return and copies of final accounts of the assessee company. The Ld OR has not brought anything contrary to the findings of Ld CIT(A) and has not brought any fact which could substantiate that there were other incriminating documents upon which the Assessing Officer had relied to estimate the turnover of the company. In our considered view, if the seized documents contain only such documents which ld CIT(A) has narrated then these cannot be said to be incriminating unless some difference are pointed out by the Assessing Officer in the documents seized and those in the Department's possession in the form of part of IT returns. In the above circumstances, we do not see any infirmity in the order of Ld CIT(A.)

12.3. The Hon'ble Gujarat High Court in Tax appeal no. 914 of 2012 in case of "Jayaben Ratial Sorathia" vide order dt. 2.7.2013 held as under.

"3.00. Mr.Pranav G Desai, ld.Counsel appearing on behalf of the appellant has vehemently submitted that the Tribunal has not properly appreciated the provisions of law more particularly section 153A of the Act, which permits the Assessing Officer to reopen/reassess the return of six preceding years. It is submitted that therefore, considering section 153A of the Act, which permits the Assessing Officer to reopen/reassess the return of six preceding years. It is submitted that therefore, considering section 153A and 153C of the Act, the Assessing Officer was justified in reopening the assessment with respect to Assessment Year 2005-06 and considering the same ratio and ratio modus operandi with respect to Assessment Year 2006-07 and 2007-08 rightly added undisclosed income on the sale of plots of land admeasuring 6426.10 sq.mtrs. sold during the year under consideration being extra sale profits received on sale of plots of land at the rate of RS.575/- per sq.mtrs. as done in the A. Y. 2006 07 and 2007-08. 3.01. Mr.Pranav G. Desai, learned counsel appearing on behalf of the revenue has further submitted that the tribunal has not properly appreciated the decision of Andhra Pradesh High Court on the issue in the case of Gopal Lal Bhadruka Versus Deputy Commissioner of Income- Tax, reported in [2012] 346 ITR 106 (AP). It is submitted that the tribunal has materially erred in distinguishing the facts of case before the Andhra Pradesh High Court in the aforesaid decision. 4.02. Now so far as the reliance placed upon the decision of the Andhra Pradesh High Court in the case of Gopal Lal Bhadruka (supra) is concerned, it is required to be noted that in the case before the Andhra Pradesh High Court, the land sale transaction was in the very assessment year in which the search was carried out. It is true and it cannot be disputed that considering section 153A of the Act, Assessing Officer can reopen and/or reassess the return with respect to six preceding years. However, there must be some incriminating material available with the assessing officer with respect to the sale transactions in the particular assessment year such as in the present case 2005 2006. Under the circumstances, on facts, the decision of the Andhra Pradesh High Court shall not be applicable to the facts of the present case. (Emphasis ours)

12.4. Hon'ble Rajasthan High Court in judgment delivered on 24.05.2013 in the case of Jai Steel (India) u/s ACIT, 259 CTR 281 (Raj.) has also dealt with similar circumstances and has held that where no incriminating document is found during search, addition cannot be made. The relevant findings of the court are as under:

"In a case where nothing incriminating is found though s. 153A would be triggered and assessment or reassessment to ascertain the total income is required to be done, the same would not result in any addition and the assessments made earlier may have to be reiterated Argument of the counsel that the Assessing Officer is free to disturb the income, expenditure or deduction de hors any incriminating material while making the assessment u/s 153A is not borne out from the scheme of the said provisions of ss.153A to 153 cannot be interpreted to be further innings for the Assessing Officer and/or the assessee beyond the provisions ofss.139, 147 and 263-A harmonious construction of the entire provisions of s.153A would lead to an irresistible conclusion that the word 'assessee' has been used in the context of abated proceedings and 'reassess' has been used for completed assessment proceedings which do not abate as they are not pending on the date of initiation of the search or making of requisition and can be tinkered only on the basis of incriminating material found during the course of search or requisition of documents therefore, it is not open to the assessee to seek deduction or claim relief not claimed by it in the original assessment which already stands completed in an assessment u/s 153A made in pursuance of a search or requisition." (Emphasis ours).

12.5. The Hon'ble A.P. High Court in I.T.A. No. 266 of 2013 dt. 12.07.2013 in the case of M/s Hyderabad House Pvt., Ltd., held as under.

JUDGMENT:(Per the Hon'ble the Chief Justice Sri Kalyan Jyoti Sengupta)
This appeal is preferred and sought to be admitted on the following suggested question of law.

"Whether on the facts and circumstances of the case, the Tribunal is correct in law in holding that the computation of undisclosed income u/s 153A/ 153C of the Act should be confined only to the material found during the course of search proceedings?"

In our opinion, the aforesaid question is very vague, as the undisclosed income shall be computed always on the basis of the material, which is found during the course of search. No material, which was disclosed at the time of regular assessment or block assessment period, can be relied on to arrive at the undisclosed income. The learned counsel for the appellant has drawn our attention to Section 158BI of the Income Tax Act, 1961, which reads as under: "158BI. The provisions of this chapter shall not apply where a search is initiated under Section 132, or books of account, other documents or any assets are requisitioned under Section 132A after the 31st day of May, 2003." (Emphasis ours)

In this present appeal, there is no statement or averment that the search was initiated under Section 132 or books of account, other documents or any assets are requisitioned under Section 132A. Therefore, there is no illegality or infirmity in the judgment and order of the learned Tribunal warranting interference of this Court. The appeal is accordingly dismissed.

12.6. In the case of ACIT vs. PSAL India P.Ltd. ITA no.2637/Del/2010 for A.Y. 2003-04 the Delhi "F" Bench of the Tribunal held as follows.

This is the appeal emanates from the order of the CIT (A)(III) Delhi dated 03.03.2010. The revenue has taken the following grounds of appeal :-

1. Whether on the facts and in the circumstances of the case, the CIT(A) has erred in law and on facts in quashing the assessment made u/s 153A by holding that no document was seized during the search pertaining to this Assessment Year?

2. *Whether on the facts and in the circumstances of the case, the CIT(A) has erred in interpreting Section 153A of the IT Act?*
3. *Whether on the facts and in the circumstances of the case, the CIT(A) has erred in placing reliance on second proviso to Section 153A(1) ignoring the main Section and the first proviso?*
4. *Whether on the facts and in the circumstances of the case, the CIT(A) has erred in law in not following the Circular NO.7 of 2003 dated 05/09/2003 issued by the CBDT.*
5. *Whether on the facts and in the circumstances of the case, the CIT(A) has erred in law by not appreciating the fact that there is no precondition that documents pertaining to each of the assessment year falling under the provisions of Section 153C/153A should be found?*
6. *The order of the CIT (A) is perverse and not tenable in law and on facts.*
7. *The appellant craves leave to add, alter or amend any/all of the grounds of appeal before or during the course of the hearing of the appeal.*

In our considered view, there is no dispute with regard to the proposition that A.O jurisdiction u/s 153A of the Act to initiate assessment/ reassessment proceedings for a years to compute the total income of the assessee including the undisclosed income action have been taken against the assessee u/s 132(1) of the IT Act. However, the question remains that when return has been processed u/s 143(1) (a) and the time period for issuing notice u/s 143(2) for selecting return for scrutiny has elapsed then what nature of proceeding commenced and concluded u/s 143(1) (a). How these are different from the proceedings commenced and concluded u/s 143(3) of the Act. There is no doubt that once the proceeding u/s 143(3) are completed and concluded then there is nothing which will abate as per provisions of section 153A of the Act.

9. *In our considered opinion, section 153A referred to "pending" "assessment" or "reassessment" and not "assessment orders". The assessment may not be pending even though there is no formal order u/s 143(l)(a). The moment return is filed and acknowledgement or intimation issued, the proceedings initiated by filing the return are closed, unless they are again triggered by issuing notice u/s 143(2) of the IT Act. In the case under consideration, the period for issuing the notice u/s 143(2) elapsed. The process has attained the finality which can only be assailed u/s 148 or 263 of the IT Act.*

Such proceedings can never be initiated u/s 143(2) when the time period for issuing notice u/s 143(2) has expired ...

The issues arises from those processed return can be raised only when some materials found against the assessee. The Hon'ble Delhi High Court in the case of Anil Kr. Bhatia sited it supra held that assessment u/s 153(A) would be similar to the orders passed in any reassessment, where the total income determined in the original assessment order and the income that has escaped assessment are clubbed together and assessed as the total income. The expiry of time for issuing notice u/s 143(2) of the Act takes away the jurisdiction of the AO for issuing notice u/s 143(2). It is jurisdictional power available with the AO to be exercised in given period. Once, it is exercised then it can be completed only by making order u/s 143(3) of the Act within the time available u/s 153(1) of the Act. Once search takes place u/s 132(1) of the Act and completion of proceeding is pending on that date then such proceedings abate.

Thus, the scope of assessment u/s 153A depends upon whether any assessment or reassessment proceedings were pending or completed on the date of the search. Whenever the abated proceedings are merged with the proceedings u/s 153A then scope of assessment vide and it will cover all issues arising from the original return and issue arising on the basis of incriminating documents, and assets found and seized during the search. Wherever the proceedings are completed prior to the search then nothing merges with proceeding u/s 153A the Act and nothing abates. In such a situation, the AO has to respect the completeness of the proceedings. Admittedly, in the case of assessee, no incriminating documents were found an seized. The provisions of section 153A give power to assessing officer to assess and reassess the income. The assessing officer is empowered to make addition on account of undisclosed income or income escaped assessment. In the case under consideration, there is no incriminating material found during the course of search relating to the assessment year under consideration. The time period for issuing notice u/s

143(2) was already expired prior to the date of search. Therefore, the proceedings do not get abated by virtue of proviso to Section 153A.

10. Therefore, the question arises whether AO can make any addition in the reassessment proceedings u/s 153(A) after making inquiries which are not suggested by any document or asset seized during the search. It depends on the nature of addition. The facts and circumstances of the assessee clearly show that no incriminating document found relating to the land development expenses debited in the books of accounts. No material was on the record on the basis which income of assessee could be further assessed by Assessing Officer. Therefore, the assessing officer has no jurisdiction to make or to resort to roving and fishing inquiries to find out whether any income has escaped assessment during these reassessment proceedings. Particularly, when there is no incriminating material found and seized during the course of search u/s 132(1) of the Act and nothing is available in record to reassess the income of assessee. In view of the above, this is not a fit case for making the addition in the year und consideration, the same are deleted. (Emphasis ours)

12.7. In the case of Kusum Gupta vs. DCIT for which one of us is a party in ITA 4873/Del/09 and other appeals order dt. March,2013, the Delhi "D" Bench of the Tribunal from para6 to 8 held as under.

"*6. Having gone through the orders of the authorities below we find that the Ld. CIT(A) has decided the issue raised in the ground in favour of the assessee following his earlier order on identical issue in the case of assessee for assessment year 2004-05. In that year also the only issue raised was as to whether while assessment order making addition in framed u/S 153 A, the AO has to restrict himself only to materials found during the course of search or any other issue was also considered. It was held that where order has already been passed u/s 143(3) and if no material is found suggesting escapement of income in this assessment then no addition can be made in Section 153 A proceedings.*

In other words in such cases addition can only be made with reference to material found during the course of search. The Ld. CIT(A) has placed reliance on the decision of the Tribunal in the case of Shri Anil Kumar Bhatia Vs. ACIT and ors, 1 ITR (Trib) 484(Delhi) holding that the power to frame assessment u/s 153 A of the Act shall be TO THE extent of income escaping assessment to the knowledge of the Assessing Officer during the course of search. It was held that the assessment u/s 153 A of the Act shall be with reference to book of accounts, article or thing found or documents seized during the search which are not disclosed in the original assessment. It is pertinent to mention overhear that in the case of Shri Anil Kumar Bhatia and Ors, the revenue had preferred appeal before the Hon'ble High Court against the order of the Tribunal and the issue raised before the Hon'ble High Court was as to whether even if assessment order had already been passed in respect of any of those six assessment years, either u/s 143(1) (a) or Section 143 (3) prior to initiation of search/requisition, still Assessing Officer is empowered to reopen those proceedings u/s 153 A without any fetters and re assess total income taking note of undisclosed income, if any, unearthed during search. It was answered by the Hon'ble High Court in affirmative and in favour of the revenue. In that case, the Hon'ble High Court has been pleased to hold that the Assessing Officer has the power u/s 153A to make assessment for all the six years and compute the total income of the assessee, including the undisclosed income, notwithstanding that the assessee filed return before the date of search which stood processed u/s 143(1) (a) of the Act. The Tribunal had held that since the returns of income by the assessee for all the six years under consideration before the search took place were processed u/s 143 (1) (a) of the Act, the provisions of Section 153 A cannot be invoked. The Hon'ble High Court did not agree with this, nor it agreed with the finding of the Tribunal that no material was found during the search. The Hon'ble High Court observed in that case, that in the entire case and arguments before the departmental authorities as well as the Tribunal had proceeded on the basis that no document embodying the transaction with Mohni Sharma was recovered from the assessee. The same is not correct the reason being that in the order of the

Tribunal itself it was mentioned that no document much less incriminating material was found during the search of the assessee's premises, except unsigned undertaking for loan. The Hon'ble High Court taking note of this material fact held that if it is not in dispute that the document was found in the course of the search of the assessee, then Section 153A is triggered . Once the Section is triggered, it is mandatory for the Assessing Officer to issue notices u/s 153A calling upon the assessee to file returns for the six assessment years prior to the year in which the search took place. The contention of the Ld. A.R remained that under this premises that some document was found in the course of the search of the assessee's premises, the Hon'ble High Court was pleased to justify the assessment made u/s 153 A of the Act. In other words, in absence of finding of any material during the course of search where assessment has already been framed u/s 143 (3) of the Act or return filed u/s 139 has already been processed u/s 143 (1) (a), addition can not be made in the assessment framed u/s 153 A of the Act, remained the contention of the Ld. A.R further contention of Ld. A.R remained that in the assessment year 2001-02 no material was seized from the premises of assessee during the course of search and assessment order was already framed u/s 143 93) of the Act before the search. The Tribunal in absence of any material found during the course of search or statement pertaining to the undisclosed income has deleted the addition made on account of non-genuineness of the gift as undisclosed income. The revenue had preferred appeal against the said order of the Tribunal vide ITA No. 831/2010 and the Hon'ble High Court vide its judgment dated 16/7/2010 has approved the order of the Tribunal. The Hon'ble High Court noted that the gifts were made by way of registered gift deeds as well as payments were made by way of account pay cheques and both the donors are income tax assesses, it cannot be said that the gifts are not genuine. We thus find that neither in the case of Anil Bhatia(Supra) decided by the Hon'ble High Court nor in the case of assessee itself for the assessment year 2001-02 any clear ratio has been laid down by the Hon'b le High Court that in absence of any material found during the course of search, no addition can be made u/s 153 A of the Act where assessment has

already been framed u/s 143 (3) or returned filed u/s 139 of the Act has been processed u/s 143(1) (a) of the Act. Having gone through the other decisions relied upon by the Ld. A.R. we find that in the case of Anil Kumar Bhatia & ors (Supra), the Tribunal held that in respect of an assessment u/s 153A, where processing of returns u/s 143(1) (a) stood completed in respect of returns filed in due course before search and no material is found in search thereafter, no addition can be made. In appeal preferred by Revenue against this order of the Tribunal, the Hon'ble Delhi High Court was pleased to hold that where assessment order had already been passed in respect of all or any of those six assessment years, either u/s 143 (1) (a) or Section 143(3) prior to initiation of search/requisition, still Assessing Officer is empowered to reopen those proceedings u/s 153A without any fetters and reassess total income taking note of undisclosed income, if any, unearthed during search. The appeal was however, allowed in favour of the Revenue because the Hon'ble High Court did not concur with the finding of the Tribunal on fact that no material was found during the search, whereas the document embodying the transaction with 'M' was recovered from the assessee in search but the same was ignored by the Tribunal on the plea that the document was not signed by 'M'. the Hon'ble High Court was pleased to hold that mere fact that the undertaking was not signed by 'M' did not absolve the assessee from the duty of satisfactorily explaining the possession of the documents. The amount was stated therein to have been advanced in cash. Thus an inference can be drawn from those decisions of the Tribunal and the Hon'ble High Court that there is no scope of debate on the ratio that taking note of undisclosed income, if any, unearthed during the search and even if assessment order had already been passed in respect of all on any of those six assessment years, either u/s 143(1) (a) or Section 143(3) prior to initiation of search/requisition, still Assessing Officer is empowered to reopen those proceedings u/s 153 A without any fetters and reassess total income. The Ld. AR in the present case before us intends to take support of this ratio. though we agree with the contention of Ld. DR that the Hon'ble High Court as it is evident from the contents of para no. 23 (P. 468, 211 Taxman 453) has not

expressed its opinion on the issue as to whether Section 153 A can be invoked even where no incriminating material was found during the search conducted u/s 132 but at least we find that there is no dispute that provisions u/s 153A can be invoked only taking note of undisclosed income, if any, unearthed during search. We find that the issue as to whether in a case where no incriminating material was found A.O had no jurisdiction to make addition in assessment or reassessment u/s 153A, has been dealt with and adjudicated upon by the Special Bench of the Tribunal in the case of Alcargo Global Logistics Ltd. Vs. Dy. CIT (2012) 137 ITO 287 (Mum) (SB), which has been followed by the Bombay Bench of the Tribunal in the case of Gurinder Singh Bawa Vs. CIT (Supra) relied upon by the Ld. AR. The issue was referred to the Special Bench on which to the conclusion that in case where assessment has abated A.O retains original as well as Section 153 A jurisdiction and when no assessment has been abated, assessment u/s 153 A can be made only on the basis of incriminating material recovered during search. The Special Bench held in that case that Provisions of Section 153 A come into operation if a search or requisition is initiated after 31/5/2003 and on satisfaction of this condition, the AO is under obligation to issue notice to the person requiring him to furnish the return of income for six years immediately preceding the year of search. The Special Bench further held that in case assessment has abated, the AO retain s the original jurisdiction as well as jurisdiction u/s 153A for which assessment shall be made for each assessment year separately. Thus in case where assessment has abated the AO can make additions in the assessment, even if no incriminating material, has been found. But in other case3s the Special Bench held that the assessment u/s 153 A can be made on the basis of incriminating material which in the context of relevant provisions means books of account and other documents found in the course of search but not produced in the course of original assessment and undisclosed income or property disclosed during the course of search. In the present case, the assessment had been completed under summary scheme u/s 143(1) and time limit for issue of notice u/s 143(2) had expired on the date of search. Therefore, there was no assessment pending in this case and such a

case there was no question of abatement. Therefore, addition could be made only on the basis of incriminating material found during search.

7. Following the decision of Special Bench in the case of Alcargo Global Logistic Ltd. (Supra) and ors, the Bombay Bench of the Tribunal in the case of Gurinder Singh Bawa (Supra) held that in search assessment pertaining to six immediately preceding assessment years which abet due to pendency, Assessing Officer can make additions even if no incriminating materials is found during search, but when all assessments are complete and no assessment has abated, Assessing Officer can only made addition on the basis of either incriminating material found during search or undisclosed income/property disclosed during search. In that case the assessment framed u/s 153A was quashed as being made without jurisdiction since the said assessment u/s 153A was made on the basis of material available in return of income and there was no reference to any incriminating material found during the search and since no assessment was abated.

8. The Bombay Bench of the Tribunal in the case of ACIT vs. Pratibha Industries Ltd. (supra) has held that proceedings u/s 153A are linked to the search having been initiated on the person, not with the documents found and seized. The documents so found and seized, may become useful to the Assessing Officer for making an assessment of total income u/s 153A r.w.s. 143(3), held by the Tribunal. In other words as per this decision where search ahs been conducted, issuance of notice u/s 153A for filing return is valid action but in such assessment no fresh addition than those made in the assessment attains finality, can be made in absence of material found and seized in search. This decision is thus supports the case of the assessee."

12.8. The following case laws also support the case of the assessee.

(a) MGF Automobiles Ltd. vs. ACIT in ITA nos.4212 and 4213/Del/2011 for Assessment Year 2004-05, 2005-06, order dt. 28th June,2013.

(b) Jai Steel (India), Jodhpur vs. ACIT, ITA; no.53/2011 and others vide judgement dt. 24th May,2013.

(c) JCIT; vs. M/s Spectrum Pearls and Exports P.Ltd. in ITA; nos. 2107 to 2113/Hyd/2011 for AYs 2003-04 to 2009-10 order dt. 4.4.2012.

13. Applying the above case laws to the facts of the case, we have to necessarily quash the assessment proceedings for Assessment Year 2004-05, 2005-06, 2006-07, 2007-08, 2008-09 on the following grounds.

(a) No books of accounts belonging to the assessee were found and seized in the premises of the other person. What was found was in the hard disk was only a confirmation of account that an attached annexures. Such documents cannot be said to be books of accounts or documents belonging to the assessee.

(b) The Revenue has not produced the record of the searched person to demonstrate that satisfaction was recorded during the course of assessment proceedings in the case of M/s Global Reality Ventures P.Ltd. On the date of recording of satisfaction, first notice u/s 153C was issued. There is no indication whatsoever, that the assessment proceedings in the case of Global Reality Ventures P.Ltd. were in progress or not at that point of time and that the A.O. during the course of that proceedings recorded this satisfaction. The procedure contemplated under the Act was not followed.

(c) The satisfaction is recorded on 23rd July,2010. The relevant A.Y. would be 2011-12. The six preceding AYs relevant to this A.Y. would be 2005-06/2006-07/2007-08/2008-09/2010-11. Thus the notice issued u/s 153'C' for the A.Y. 2004-05 is clearly barred by limitation.

(d) Even otherwise, as there is no incriminating material found during the course of search, the A.O. should have dropped the proceedings initiated u/s 153'C' of the Act.

(e) As there is no dispute that no assessment or reassessment has abated in this case for the reason that, the date of search which in the case on hand would be 25.3.2010, by virtue of First Proviso to S.153'C', i.e. the date of passing an order u/s 127 transferring the cases of the assessee to the present Assessing Officer no assessment or reassessment was pending. When no assessment has abated, the question of making any addition or making disallowance which are not based on only material found during search is bad in law.

14. For the A.Y. 2009-10 no notice u/s 153'C' was issued. Notices u/s 143(2) and 142(1) were issued on 6.9.2010 and assessment was completed by making additions u/s 14A and also making an adhoc disallowance of Rs.15 lakhs u/s 37.

14.1. After hearing rival contentions; we hold as follows. The disallowance u/s 14A is set aside to the file of the A.O. for fresh consideration in accordance with the principles laid down in the decision of Hon'ble Jurisdictional High Court in the case of Maxopp Investments Ltd. vs. CIT, 247 CTR 162(Del). In the result this ground is set aside for statistical purposes.

14.2. Ground no.2 is against the adhoc disallowance of Rs.15 lakhs. The reason given by the A.O. is as follows.

"As per the provisions of the Section 37 all expenses incurred for the purpose of business is allowable expenditure. The main requirement is that the expenditure should have been incurred wholly and exclusively for the purpose of business. Business expenses are expenses that are incurred for carrying on of ;business activities. In the case at hand, the assessee has failed to prove the justification of above expenses and such a meteoric rise in expenses comparing with the income has been a subject matter of enquiry. But the assessee has also not furnished any detail in this regard. Therefore, at this stage, it is very difficult to pin ;point the exact expenditure. Keeping in view the above facts of the case and

limitation in the matter, an amount of Rs.15,00,000/- is disallowed and added to the income of the assessee for the year."

The Ld.Commissioner of Income Tax (Appeals) confirmed the addition in a cryptic manner. We are unable to uphold this adhoc addition, as it is not based on any material. The disallowance has been made based on ;surmises and conjectures. The Assessing Officer has not justified the disallowance in a proper manner. The assessee has produced all evidences in support of this expenditure. Thus we delete the same and allow this ground.

15. In the result the appeals of the assessee for all the Assessment Years 2004-05, 2005-06, 2006-07, 2007-08, 2008-09 are allowed and the appeal for the Assessment Year 2009-10 is partly allowed.

Order pronounced in the Open Court on ..... November,2013.

(I.C. SUDHIR)
JUDICIAL MEMBER

(J.SUDHAKAR REDDY)
ACCOUNTANT MEMBER

Dated: the November,2013

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